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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91161603
Party	Plaintiff Allergan, Inc. Allergan, Inc. 2525 Dupont Drive Irvine, CA 92612
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Date	06/06/2006
Attachments	Motion to Strike.pdf (4 pages)(302289 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 78/320,975
Published in the Official Gazette of August 3, 2004

ALLERGAN, INC.,

Opposer,

vs.


BIOCENTRIC LABORATORIES, INC.,

Applicant.

Opposition No. 91161603

CERTIFICATE OF ON-LINE FILING

I hereby certify that on June 6, 2006, this paper was filed on-line with the Trademark Trial and Appeal Board.


Eleanor Elko

**OPPOSER'S MOTION TO STRIKE "EVIDENCE" SUBMITTED BY APPLICANT AND
REQUEST FOR EXTENSION OF TIME TO FILE OPPOSER'S TRIAL BRIEF**

Opposer Allergan, Inc. ("Opposer") hereby moves for an order striking the document filed by Applicant BioCentric Laboratories, Inc. ("Applicant") entitled "Submission Number 9," which was sent to the Board on May 10, 2006, but not served on Opposer until May 17, 2006. The document was not filed during Applicant's testimony period (which closed on March 26, 2006) and, in any event, was not submitted properly as evidence in this matter. Accordingly, it should be stricken.

Submission Number 9, which is not verified, contains several statements regarding the purported personal experiences of Applicant's owner, statements regarding the ingredients that purportedly are contained in the product sold under Applicant's mark, statements regarding the existence of several registrations owned by third parties, and copies of printouts from the U.S. Patent and Trademark Office's TESS database. The document apparently was intended to introduce testimony and evidence by Applicant. As discussed below, regardless of whether Applicant's Submission is considered testimony or a Notice of Reliance, it is improper.

The Trademark Rules of Practice set forth in detail the manner by which evidence should be submitted in a Board proceeding. It can be introduced through a testimony deposition noticed

and taken during the party's testimony period (37 CFR § 2.123) or through a Notice of Reliance filed during the party's testimony period (37 CFR § 2.122). Regardless of the form, evidence must be submitted during a party's testimony period. In this proceeding, pursuant to 37 C.F.R. §2.121, on September 20, 2005 the Board issued a trial order assigning to each party the time for taking testimony, and ordering that no testimony shall be taken except during the times assigned, unless by stipulation of the parties and approved by the Board, or, upon motion, by order of the Board. These dates have not been extended.

The testimony periods in this proceeding therefore were scheduled as follows:

1. Thirty-day testimony period for party in position of plaintiff (i.e., Opposer Allergan, Inc.) closed January 25, 2006;
2. Thirty-day testimony period for party in position of defendant (i.e., Applicant BioCentric Laboratories, Inc.) closed **March 26, 2006**;
3. Fifteen-day rebuttal testimony period for party in position of plaintiff closed May 10, 2006.

Submission Number 9 was filed and served almost two months *after* the close of Applicant's testimony period, and even after the close of *Opposer's* rebuttal testimony period. As a result, whether it is considered to be testimony or a Notice of Reliance, it should be stricken as untimely. *See M-Tek Ins. v. CVP Systems Inc.*, 17 USPQ2d 1070, 1072 (TTAB 1990) (untimely deposition stricken); *May Department Stores Co. v. Prince*, 200 USPQ 803, 805 n.1 (TTAB 1978) (motion to strike untimely notice of reliance granted).

Moreover, even had Applicant's Submission been timely filed, it is substantively improper. If Applicant wanted to introduce the information contained in Submission Number 9, it was incumbent upon Applicant to take a testimony deposition and follow the rules governing same. 37 CFR §2.123. Applicant failed to do so. Moreover, to the extent Applicant's Submission might be considered to be a Notice of Reliance, it does not comply with any of the

rules governing the introduction of the types of evidence contained therein. *See*, 37 CFR §2.122; TBMP §704.03(b)(1)(B) (regarding prerequisites for introduction of third party registrations).

Applicant cannot rely on its ignorance of the applicable Rules to excuse its non-compliance with them. Applicant apparently has yet to become familiar with the procedures of the Board, notwithstanding the Board's several Orders directing it to read and become familiar with the Federal Rules of Civil Procedure, the Trademark Rules of Practice, and the TBMP. *See*, March 10, 2005 and September 20, 2005 Orders. The fact that Applicant is proceeding *pro se* should not afford it the opportunity to intentionally remain ignorant of the applicable rules and the Board's procedures. Opposer should not be prejudiced by Applicant's failure to comply with the Rules of Practice and the trial deadlines set by the Board. Submission No. 9 should be stricken and not considered by the Board. *See* 37 C.F.R. §2.123(l); TBMP §706.

In order to allow Opposer to know with certainty what evidence is of record prior to filing its Brief, Opposer requests that the deadline to file its trial brief, currently set for July 10, 2006, be extended to sixty (60) days after the Board issues a decision on this Motion.

June 6, 2006

Respectfully submitted,

SEYFARTH SHAW LLP

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2006, I served the foregoing Opposer's Motion to Strike "Evidence" Submitted by Applicant and Request for Extension of Time to File Opposer's Trial Brief by depositing a true copy thereof in a sealed envelope with the United States Postal Service "Priority Mail Service" addressed to applicant as follows:

Ms. Rebecca Spaar
Chief Executive Officer
BioCentric Laboratories, Inc.
854 Baseline Place, Suite B
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AND

Ms. Rebecca Spaar
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Eleanor Elko